ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, Ext. 13
Facsimile: (619) 684-3553
robert_rexrode@rexrodelawoffices.com

Attorneys for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE PETER C. LEWIS**)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	CASE NO. 08mj8509 DATE: June 19, 2008 TIME: 1:30 p.m. **PLACE: United States District Courthouse, El Centro, Ca.** NOTICE OF MOTIONS: (1) TO COMPEL DISCOVERY; (2) TO PRESERVE EVIDENCE; AND, (3) TO INCORPORATE MOTIONS INTO INDICTED CASE.

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY,
CHARLOTTE KAISER, ASSISTANT UNITED STATES ATTORNEY, AND
JOHN WEIS, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on June 19, 2008, at 1:30 p.m., **at the United States District Courthouse in El Centro, California**, or as soon thereafter as counsel may be heard, the defendant, Jose Gastelum, by and through his counsel, Robert Rexrode, will ask this Court to enter an order granting the following motions.

MOTIONS

The defendant, Jose Gastelum, by and through his attorney, Robert Rexrode, pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law and local rules, hereby moves this Court for an order:

1) to compel discovery;
2) to preserve evidence; and,
3) to incorporate motions into indicted case.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, and all other materials that may come to this Court's attention at the time of the hearing on these motion.

Respectfully submitted,

Dated: June 13, 2008

/s/ Robert H. Rexrode

ROBERT H. REXRODE, III
Attorneys for Mr. Gastelum
robert_rexrode@rexrodelawoffices.com

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SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE PETER C. LEWIS**)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	)	CASE NO. 08mj8509 STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS.

I.

FACTUAL HISTORY[1]

Agents arrested Mr. Gastelum on June 5, 2008. They did so after using a spike-strip (euphemistically described by agents as a Controlled Tire Deflation Device) to puncture the tires of a car allegedly driven by Mr. Gastelum. Once agents stopped the car, they discovered six undocumented immigrants. Agents chose to retain three of these immigrants. At the request of Mr. Gastelum, the government retained a fourth immigrant from the car.

Mr. Gastelum is now facing charges related to transporting these immigrants. The government intends to seek an indictment on these events and defense counsel expects Mr. Gastelum to arraigned on an indictment at his next court date–June 19, 2008.

[1]The following facts are based on information provided by the government. Mr. Gastelum does not admit their accuracy and reserves the right to challenge them.

II.

MOTION COMPEL DISCOVERY

The following discovery request is a limited, preliminary request. Recognizing that discovery motions are normally heard in this district by the district judge assigned to a case, Mr. Gastelum has limited his current request to information that may become worthless if not disclosed at this point.

1. Identities and Contact Information of Those in the Car

Mr. Gastelum requests disclosure of the identities and contact information of the three undocumented immigrants involved in this case who were not initially retained as material witnesses by agents. According to the complaint in this case, agents retained three people as material witnesses: Jose Toledo-Corrales, Blanca Morado-Lopez, and Ernesto Martinez-Mosqueda. Also according to the complaint, however, there were three other undocumented immigrants in the car. Defense counsel has reason to believe that the government has retained, at Mr. Gastelum's request, a fourth individual.

Mr. Gastelum requests disclosure of the three as-yet-unidentified immigrants referred to in the compliant. These people are percipient witnesses to the alleged crime committed by Mr. Gastelum and their identities are thus discoverable. *See*, *e.g.*, *Roviaro v. United States*, 353 U.S. 52, 61-62 (1957). Defense counsel also has a good-faith belief that their observations may be material to the preparation of Mr. Gastelum's defense, and thus any documents or data related to these individuals are discoverable under Federal Rule of Criminal Procedure, Rule 16 (a)(1)(E)(i). Additionally, the government has an affirmative duty to disclose information which exculpates or tends to exculpate Mr. Gastelum. *Brady v. Maryland*, 373 U.S. 83 (1963). And last, as a matter of simple fairness and due process, the government should disclose those people are witnesses to the events that led to Mr. Gastlum's arrest, particularly when Mr. Gastelum does not have the ability to ascertain the identities of these witnesses.

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III.

MOTION TO PRESERVE EVIDENCE

Again, the motion below to preserve evidence is a limited, preliminary request.

1. Material Witnesses

Agents retained three of the six undocumented immigrants involved in this case. Mr. Gastelum has reason to believe the government secured the retention of a fourth individual. Mr. Gastelum requests that this fourth individual be held in the United States, pending his ability to interview this individual. Mr. Gastelum also requests that the remaining two individuals be held in the United States, pending his ability to interview these individuals. For the reasons discussed above in his motion to compel discovery, Mr. Gastelum believes this request a proper one. Recognizing, however, the cost of his request–to both these individuals and the government–Mr. Gastelum will expedite his interviews.

2. Car Allegedly Driven by Mr. Gastelum

Mr. Gastelum requests the government preserve the car allegedly driven by Mr. Gastelum in this case. *See* Fed. R. Crim. P. (a)(1)(E)(i).

3. Border Patrol Cars Involved in Arrest

Mr. Gastelum acknowledges this is an odd request. Nonetheless, defense counsel has a good-faith belief that the condition of the Border Patrol cars involved in Mr. Gastelum's arrest will be material to Mr. Gastelum's defense. They are thus discoverable under Federal Rule of Criminal Procedure, Rule 16 (a)(1)(E)(i). Not wanting to seem unreasonable, however, Mr. Gastelum merely requests the opportunity to inspect and photograph the *exterior* of these cars *in the same condition* as they were following Mr. Gastelum's arrest. He therefore requests an order preserving these cars in the condition they appeared following Mr. Gastelum's arrest. Mr. Gastelum will expedite his inspection and photography to limit any inconvenience to the Border Patrol.

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4. Law Enforcement Communications Related to the Arrest

Mr. Gastelum requests preservation of any recorded communications between agents as they relate to Mr. Gastelum's arrest on June 5, 2008. Defense counsel has a good-faith belief that these communications may be material to the preparation of Mr. Gastelum's defense, and thus are discoverable under Federal Rule of Criminal Procedure, Rule 16 (a)(1)(E)(i). Recognizing, however, that this case is in its early stages, at this point, Mr. Gastelum is simply requesting the preservation of these recorded communications.

IV.

MOTION TO INCORPORATE MOTIONS INTO INDICTED CASE

The government intends to seek an indictment on these events and defense counsel expects Mr. Gastelum to arraigned on an indictment at his next court date–June 19, 2008. If this turns out to be the case, Mr. Gastelum requests that the above motions be incorporated into that indicted case.

V.

CONCLUSION

Mr. Gastelum requests this Court grant his motions.

Respectfully submitted,

Dated: June 13, 2008

/s/ Robert H. Rexrode
ROBERT H. REXRODE, III
Attorney for Mr. Gastelum
robert_rexrode@rexrodelawoffices.com

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UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	)	CASE NO. 08mj8509 PROOF OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served via CM/ECF and email this day upon:

Charlotte Kaiser, Assistant United States Attorney
charlotte.kaiser@usdoj.gov
John Weis, Assistant United States Attorney
john.weis@usdoj.gov

Respectfully submitted,

/s/ Robert H. Rexrode

Dated: June 13, 2008

ROBERT H. REXRODE, III
Attorney for Defendant
robert_rexrode@rexrodelawoffices.com